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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 1079

BURTON C. BOVARD, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Claims entered in the above cause on February 6th, 1963.

OPINION BELOW

The opinion of the United States Court of Claims, unreported, is set forth in the Appendix, page 1a. The opinion of the United States Court of Appeals for the District of Columbia, is found in 265 F. 2d 823.

JURISDICTION

The judgment of the Court of Claims was entered on February 6, 1963. Jurisdiction of this Court is invoked under Section 1255(1) of the Judicial Code, 62 Stat. 928, 28 U.S.C. § 1255.

STATUTES INVOLVED

Statute of Limitations for claims against United States ch. 1263, sec. 52, 68, stat. 1246, 28 U.S.C. 2501, reprinted in Appendix.

STATEMENT OF THE CASE

Petitioner, a Veteran's Preference eligible, was an employee of the Federal Housing Administration from July 12, 1935, to his removal on July 15, 1954, a period of nineteen years. The plaintiff was appointed General Counsel of that agency on December 18, 1940, and held that position until his removal. Petitioner was placed on involuntary annual leave April 14, 1954, by a newly appointed Acting Commissioner of two days tenure, and on May 7, 1954 was served with a "Notice of Proposed Adverse Action". On July 14, 1954, he was served with a "Notice of Adverse Decision", and was dismissed at the close of business on July 15, 1954.

Petitioner appealed to the Civil Service Commission July 26, 1954. An Appeals Examiner sustained certain of the charges and affirmed the Agency decision. On December 27, 1954, petitioner appealed to the Board of Appeals and Review of the Civil Service Commission. That board, on September 23, 1955, found none of the charges sustained, found some too vague, upheld his appeal and ordered him restored to duty. However, on November 16, 1955, at the request of an

Acting Commissioner of Federal Housing Administration, the Commission reopened the case; and, on December 29, 1955, the then Civil Service Commissioners upon a so-called "reconsideration", ex parte, and admitting extraneous alleged evidence not previously before the Board of Appeals and Review, by a vote of two to one, upheld the Agency's dismissal of petitioner, after over one year and five months of administrative deliberation.

Within little more than a month later, on February 14, 1956, petitioner filed suit in the United States District Court for the District of Columbia for reinstatement.

On March 12, 1957, the District Court denied cross motions for summary judgment remanding the cause for entry of new findings by the Civil Service Commission in compliance with the statutory requirements. On August 15, 1957, the new findings were filed. On November 19, 1957, the District Court again remanded for new findings by the Civil Service Commissioners, since the August 15th findings still did not comply with the requirements of the Veteran's Preference Act of 1944. On January 14th, 1958, the second set of new findings were filed by the Commission; cross motions for summary judgment were again filed in May and June of 1958. On July 15th, 1958, the District Court awarded summary judgment to the Government without findings of fact. This was appealed, and by decision of the United States Court of Appeals for the District of Columbia Circuit on March 19, 1959, petitioner's suit was ordered dismissed solely on the technical ground of failure to substitute successor parties, as required by Rule 25(d) of the Federal Rules of Civil Procedure, since while the suit had been pending in District Court, two of the members of the Civil Service

Commission had resigned and petitioner had failed to substitute the new members as defendants within six months. The Court's decision did not take into account the fact that the two new Commissioners in effect entered their own appearance as parties by signing and filing new "Findings" captioned in the District Court proceeding. The Court intimated no opinion as to the several motions for summary judgment and did not pass on the merits. Pursuant to the Court of Appeals decision, the action was dismissed on April 27, 1959. *Bovard* v. *Young*, 265 F. 2d 823. Such dismissal was necessarily without prejudice to a re-institution of the action in the District Court or the filing of an action in the Court of Claims.

Petitioner, through different counsel, thereafter elected to file his action in the United States Court of Claims on June 24, 1960, within the statutory six year period allowed for claims against the United States. His petition there showed that after his discharge he had earned, from July 14, 1954 to June 15, 1960, a total of $14,519.90, or an average of about $2,600 per year.

QUESTIONS PRESENTED

1. Whether the Court of Claims erred in applying the doctrine of laches to bar a claim based, not on equity, but on a statutory right, for which Congress has provided a statute of limitations.

2. Whether the Court of Claims erred in determining that petitioner's claim for back salary from the time of his wrongful dismissal until the institution of the action below in the Court of Claims was barred by laches, in spite of the fact that petitioner (a) had promptly initiated and pursued his administrative remedies; (b) filed suit in the U. S. District Court for

the District of Columbia approximately one month later, and litigated there for over three years, during which period the defendants caused delays of about fourteen months in the filing of new "Findings" upon orders of the District Court; (c) and then waited a little over one year before filing suit in the Court of Claims.

3. Whether the Court of Claims erred in deciding that a period of less than fourteen months can constitute an unreasonable delay, so as to prejudice respondent herein as a matter of law, although respondent had at all times notice of petitioner's claim, and of the grounds on which he relied.

4. Whether the Court of Claims erred in applying the doctrine of laches to a claim for which petitioner had promptly filed suit in the United States District Court for the District of Columbia, and which he prosecuted in administrative agencies and Federal courts continuously from the time of his dismissal April 14, 1954, until his action was dismissed in the United States Court of Appeals for the District of Columbia on April 27, 1959.

5. Whether the Court of Claims erred in applying the doctrine of laches against petitioner when respondent was at liberty to determine the liability of the parties at any time under the Declaratory Judgment Act, 62 Stat. 964, as amended, § 2201.

6. Whether the Court of Claims erred in determining that petitioner had not sufficiently explained his delay in filing suit in the Court of Claims after his prior action was dismissed by the United States Court of Appeals for the District of Columbia Circuit when his petition and prayer for relief indicated that he earned an average of $2600.00 per year since his wrongful discharge.

7. Whether the Court of Claims erred in dismissing petitioner's entire claim for back wages from July 14, 1954 to June 15, 1960, on the basis of a delay in filing the petition in the Court of Claims from April 27, 1959, until June 24, 1960, and up to April 27, 1959, petitioner had vigorously prosecuted his claim, when petitioner's Court of Claims petition asked for his wages "subject to any modification which may result upon a hearing and a finding by the Court."

8. Whether the Court of Claims erred in not remanding the cause to a Commissioner for a finding of fact on whether or not petitioner had abandoned his office, and whether he was an "officer" or an "employee," and in determining these questions of fact solely on the pleadings.

REASONS FOR GRANTING THE WRIT

1. The Question is Important, as is Shown by the Number of Cases in Lower Courts Which Have Passed on Laches

In addition to the obvious fact that this question concerns the basic rights of every government employee, the number of cases in both the Court of Claims and the Court of Appeals for the District of Columbia Circuit which have passed on the application of laches as here involved indicate the confusion which surrounds this area.

In the Court of Claims, laches by a discharged government employee has been passed upon by the Court in the cases of *Feldman* v. *United States* (1960), 181 F. Supp. 393, 118 Ct. Cl. 91; *Bailey* v. *United States*, (1959), 144 Ct. Cl. 720, 171 F. Supp. 281; *Miner* v. *United States* (1958), 143 Ct. Cl. 801; *Henry* v. *United States* (1957), 138 Ct. Cl. 362; *Kaufman* v. *United States* (1951), 93 F. Supp. 1019, 118 Ct. Cl. 91; *Jeffrey*

v. *U. S.* (1954), 127 Ct. Cl. 231; *Baxter* v. *U. S.* (1952), 122 Ct. Cl. 632; *Winsberg* v. *U. S.* (1951), 120 Ct. Cl. 511, 98 F. Supp. 345; *Kelly* v. *U. S.* (1951), 119 Ct. Cl. 197, 93 F. Supp. 611, aff'd 342 U.S. 193, 72 S. Ct. 213, 96 L. Ed. 222; *Poggas* v. *U. S.* (1951), 118 Ct. Cl. 385, 93 F. Supp. 1009, *Mot. Den.*, 118 Ct. Cl. 385, 96 F. Supp. 609; *Levy* v. *U. S.* (1951), 118 Ct. Cl. 106; *Simon* v. *U. S.* (1949), 113 Ct. Cl. 182; *Karpoff* v. *U. S.* (1958), 142 Ct. Cl. 93.

In the United States Court of Appeals for the District of Columbia, laches has been used to deny relief to government employees in the following cases: *Benson* v. *Zahner* (1960), 289 F. 2d 757; *Caswell* v. *Morgenthau* (1938), 98 F. 2d 296, *Cert. Den.*, 305 U.S. 596, 59 S. Ct. 81, 83 L. Ed. 378, *Mot. Den.*, 306 U.S. 616, 59 S. Ct. 460, 83 L. Ed. 1023; *Evans* v. *Leedom*, (1959), 265 F. 2d 125; *Jones* v. *Summerfield* (1959), 265 F. 2d 124; *Elchbegoff* v. *Dulles* (1954), 123 F. Supp. 831, aff'd 222 F. 2d 53, *Cert. Den.*, 350 U.S. 814, Reh. Den. 350 U.S. 919; *Drowa* v. *Hipley*, (1957), 244 F. 2d 714; *Haas* v. *Overholser* (1955), 223 F. 2d 314; *Wunderle* v. *Kimball* (1952), 201 F. 2d 707; *Baxter* v. *Pace* (1951), 193 F. 2d 20.

2. The Supreme Court Has Not Passed on the Question of Laches in Suits by Discharged Government Employees Since 1926, and the Lower Courts Have Failed to Apply Even These Early Cases Correctly Because of Their Inadequate Treatment of the Question

This Court has passed upon the effect of delay in seeking reinstatement or compensation by discharged government employees exactly four times; the last time was in 1926, in the case of *Myers* v. *United States*, 272 U.S. 52, 47 S. Ct. 21, 71 L. Ed. 160 (1926). Prior to that, the Court had decided *United States ex rel*

Arant v. *Lane*, 249 U.S. 367, 39 S. Ct. 293, 63 L. Ed. 650 (1919); *Nicholas* v. *United States*, 257 U.S. 71, 42 S. Ct. 7, 66 L. Ed. 133 (1921); and *Norris* v. *United States*, 257 U.S. 77, 42 S. Ct. 585, 66 L. Ed. 136 (1921).

Aside from the basic inequity of imposing a harsh limitation on such suits by government employees, the vice of these cases was what they did not say, thus leaving the legal profession in the confusion evidenced by the multiplicity of suits shown hereinbefore.

In *Arant* v. *Lane*, *supra*, the defense of laches was applied to a suit for a peremptory writ of mandamus. Since laches has traditionally been applied to mandamus (citations quoted by the Court), that case was in line with precedent.

By contract, in *Norris* and *Nicholas*, *supra*, "officers" of the government, as distinguished from "employees", brought an action in the Court of Claims for wages. In neither of these cases did the court use the term "laches"; instead, the court stated that the officer's lack of diligence "*evidenced an abandonment*" of the title to the office. However, subsequent cases in the lower courts have quoted these cases as passing on "laches". The distinction will be examined *infra*.

In *Myers*, the Court was again faced with an *officer* suing for wages, and, although the court mentions laches, it is only in connection with a concession by the Attorney General that none was shown.

As can be seen from the above, the Court did not underline the distinction between suits for mandamus and suits for compensation; but the defense of *abandonment* is entirely distinct from the defense of laches in these cases, as will be shown infra; and the Court's choice of language shows the distinction was present.

The former is a proper defense to a suit for compensation by public officers, and was used by the Court in those cases. The latter is *only* a defense to mandamus, and to other equitable actions.

3. The Court of Claims Erred in Applying Laches to the Case of a Government Employee's Suit for Compensation

(a) Laches is a defense to equitable, not legal claims

Laches has always been an equitable defense. This was stated by this Court in the case of *Rio Grande Irrigation Co.* v. *Gildersleeve*, 174 U.S. 603, 19 S. Ct. 223, 42 L. Ed. 626 (1898), as well as by the texts and chancery cases in England.

Mandamus is one exception, as it is equitable in nature, though given by the Common law courts (*Touchton* v. *City of Fort Pierce* (5th Cir., 1940) 109 F. 2d 370, cert. den. 310 U.S. 652, 60 S. Ct. 1105, 84 L. Ed. 1417, Reh. Den. 311 U.S. 752, 61 S. Ct. 56, 85 L. Ed. 472.)

(b) And a suit for compensation of a government officer or employee is a strictly legal proceeding

As this Court said in the case of *In re Sawyer*, 124 U.S. 200, 212, 8 S. Ct. 482, 31 L. Ed. 402 (1887)

> "It is equally well settled that a court of equity has no jurisdiction over the appointment and removal of public officers. . . . The jurisdiction to determine title to a public office belongs exclusively to courts of law. . . ."

And the right to salaries and emoluments of an office are dependent on a finding of title to the office. (67 C.J.S. 318, § 83). Moreover a suit for a money judgment, when the right is created by statute, should not be governed by equitable rights, since equity did not

award money judgments (cf. *Jamison Coal & Coke Co.* v. *Goltra*, (C.C.A. Mo., 143 F. 2d 889, cert. den. 323 U.S. 769, 65 S. Ct. 122, 89 L. Ed. 615)), the basis of this being the existence of an adequate remedy at law. This is also shown by the lack of equity jurisdiction in the Court of Claims, infra.

Nicholas and *Norris*, *supra*, can not be held to have changed this and allowed equitable defenses to be interposed in an action at law, since, as shown above, they were decided not on laches, but on *abandonment*.

(c) Moreover, the Court of Claims has no equity jurisdiction

The jurisdiction of the Court of Claims does not extend to equitable claims, absent a special statute. This was decided in the case of *Harvey* v. *United States*, 105 U.S. 671, 26 L. Ed. 1206 (1881), where this Court held that, absent a special statute, the Court of Claims could not reform a contract, even though this was a "claim against the United States," and the action was brought on a *legal* claim, for reformation belongs to courts with equity jurisdiction, and cannot be a defense to a legal claim.

Later, Congress passed the Tucker Act (Act March 3, 1887, c. 359, § 1, 24 Stat. 505). That section amended the Court of Claims jurisdiction to include "all claims . . . in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable."

In the case of *Millikin Imprinting Co.* v. *United States* (1904), 40 Ct. Cl. 81, the Court of Claims used this act as an excuse to consider equitable defenses and relief if the claim was for a money judgment, and the Supreme Court agreed with this interpretation in

United States v. *Milliken Imprinting Company*, 202 U.S. 168, 26 S. Ct. 572, 50 L. Ed. 980 (1905).

But regardless of whether this interpretation was correct (and, since the Court of Claims has no admiralty jurisdiction according to *Sanday & Co.* v. *United States* (1932), 76 Ct. Cl. 370, this seems doubtful), the Act of June 25, 1948, (c. 646, 62 Stat. 940) which is the present statute for Court of Claims jurisdiction (28 U.S.C. § 1491) deliberately omitted these words. Hence, the Court of Claims now has the jurisdiction which it had under *Harvey* v. *United States*, *supra*, and no more.

4. This Mistaken Theory of Denying Relief to Government Employees Has Prejudiced All Such Claims

(a) Because the courts below have not distinguished between "Officers" and "Employees", and have thus discriminated against employees

While *Nicholas* and *Norris*, *supra*, quoted *Arant* v. *Lane* as imposing a duty of diligence on discharged officers, they did not say that laches would bar their claims. On the contrary, those cases specified "abandonment" in suits for wages.

There are two main reasons why this distinction is important. *First*, because abandonment, unlike laches, requires a voluntary act by the claimant and is not applied as a matter of law. (1 C.J.S. 7, § 2(7); *Baglin* v. *Cusinier Co.*, 221 U.S. 58, 31 S. Ct. 669, 55 L. Ed. 863 (1911); *Wolff* v. *Canadian Pacific Ry. Co.*, 56 P. 453, 123 Cal. 535, 539). This distinction can be seen in the *Nicholas* decision in the Court of Claims: Nicholas did not appeal within the executive department, and did not protest his separation at all, until his suit (55 Ct. Cl. 188 (1890)). This Court held this to be

evidence of abandonment, and accepted this fact-finding by the Court of Claims.

But the claimant in a case of abandonment, unlike laches, can show the absence of the voluntary abandonment rather than merely an excuse for delay. (See *Baglin* v. *Cusinier Co., supra*) There is no need actually to file a suit to avoid abandonment. (*State* v. *Frantz*, 75 N.W. 546, 55 Neb. 467). Abandonment, being a question of intent, is thus a fact question and is normally referred to the jury. (*Morisette* v. *U. S.*, 187 F. 2d 427 (C.A. Mich. 1951), rev'd on other grounds, 342 U.S. 246, 72 S. Ct. 240, 96 L. Ed. 288; *Bunch* v. *Grant County*, 229 P. 485, 100 Okl. 268; *Wardwell* v. *Inhabitants of the Town of Castine*, 144 A. 2d 530, 154 Me. 123). Poverty, for example, is admittedly not a sufficient excuse for laches; but a jury might well find it sufficient explanation for delay, and thus find that the facts did not show abandonment. Petitioner in this case had shown in his initial petition to the Court of Claims that his income averaged $2,600.00 per year since his discharge. This, rather than any possible intention to abandon, would explain a delay of fourteen months prior to filing the petition.

Second, the distinction is important because abandonment only applies to *officers*. The distinction between "officers" and "employees" has been wholly overlooked by the courts in the cases cited here. In laches, it is unimportant. But an employee, unlike an officer, has no office to abandon; he has only a statutory right. (*Wetzel* v. *McNutt*, (S.D. Ind., 1933) 4 F. Supp. 233). Petitioner here was probably an employee, since he was not appointed by the President, Congress, or the head of an executive department, under the authority of statute. No statute created his

office. *Barnap v. United States*, 252 U.S. 542, 40 S. Ct. 374, 64 L. Ed. 692 (1920). Therefore, the law of abandonment which is a part of the law of officers; rather than employees, would not apply in his case, and *Norris* and *Nicholas*, *supra*, are not precedents.

The only limitations on petitioner's statutory right were the statute of limitations (discussed supra), and a duty to mitigate by offsetting his earnings during the period of unlawful discharge, unlike the salary of an officer; (*Stockton v. Department of Employment*, 153 P. 2d 741, 25 Cal. 2d 264; *Cortman v. McDevitt*, 142 P. 2d 383, 111 Colo. 437, 150 A.L.R. 97; *Brady v. Greche*, 291 N.Y.S. 366, 249 App. Div. 666) whereas an officer need not offset these earnings. (67 C.J.S., P. 362 § 99(d); *McCallum v. U. S.* (1909), 44 Ct. Cl. 194). Thus, in the case of an officer, the government is not protected (as in the case of an employee) by the employee's duty to mitigate. The officer's entire salary is due.

5. Public Policy, Which Requires Some Limitation on Such Claims, Does Not Require the Application of the Doctrine of Laches

(a) The courts could apply the common law duty to mitigate damages

As has been shown above, employees have a duty to mitigate damages by accepting other employment, and offsetting their earnings against their claims. Officers have only the duty of diligence.

(b) The courts could, and should, apply the statute of limitations

Congress has provided a statute of limitations applicable to all claims against the United States. (Act of June 25, 1948; c. 646, 62 Stat. 976, 28 U.S.C. § 2501).

This would limit the amount of a government employee's claim of itself.

Clearly, a wage claim comes within the statute which includes all claims against the United States. And even if petitioner's action was in equity, this statute, rather than laches, would apply. (*Johnson* v. *Umsted* (1933), 64 F. 2d 316; *Petition of President and Directors of Manhattan Co.*, 73 N.Y.S. 2d 881; *Kolle* v. *McNamara*, 82 N.Y.S. 2d 294). And even if the statute did not include by its terms a wage claim, equity would apply it by analogy to a legal contract claim, and cast the burden on the defendant to show why plaintiff should be required to bring his action in a shorter time. (*Shultz* v. *Manufacturers & Traders Trust Co.*, D.C. N.Y., 40 F. Supp. 675; aff'd, 128 F. 2d 889, cert. den. 317 U.S. 674, 63 S. Ct. 79, 87 L. Ed. 541, reh. den. 317 U.S. 710, 63 S. Ct. 204, 81 L. Ed. 565.) The fact remains that this is a legal claim, and there is no reason whatsoever why this statute should not be applied.

(c) The Government could have protected itself at any time under the Declaratory Judgment Act

The requirement of lack of knowledge of the plaintiff's claim has always been an ingredient of the defense of laches; this Court recognized it in the case of *Connecticut General Life Insurance Co.* v. *Eldredge* (1880), 102 U.S. 545, 26 L. Ed. 245; and the defendant "must have good reason to believe that the alleged rights are worthless, or have been abandoned." *Penn. Mutual Life Insurance Co.* v. *Austin*, 168 U.S. 685, 42 L. Ed. 626, 18 S. Ct. 223 (1898). This is especially true under the Federal Declaratory Judgment Act (June 25, 1948, c. 646, 62 Stat. 964, 28 U.S.C. § 2201): for under that act, the United States had an equal

right to cut short its liability by instituting suit; petitioner instituted his initial suit in the United States District Court for the District of Columbia under this act, and after this suit was dismissed, the United States, having knowledge of his claim, might have settled it by instituting a new action (cf. *United States* v. *Montgomery Ward & Co.*, (D.C. Ill. 1945), 58 F. Supp. 408, cert. den. 324 U.S. 858, 65 S. Ct. 862, 89 L. Ed. 1416, reh. den. 324 U.S. 888, 65 S. Ct. 867, 89 L. Ed. 1436, rev'd on other grounds, 150 F. 2d 369, vacated 326 U.S. 690, 66 S. Ct. 140, 90 L. Ed. 406.) It is hard to see how a party with an equal right to institute litigation, who knows the facts of plaintiff's claim and his grounds, can wait for plaintiff to act and then claim laches.

(d) The Court could have applied the safeguards employed by the National Labor Relations Board in similar situations

In cases of wrongful dismissal by private parties, the National Labor Relations Board's reinstatement orders have shown that mitigation of damages can be a duty of the discharged employee; and this is the common legal defense to the action to recover wages, whether by contract or by statute, for discharge for union activities. Thus when the employees unreasonably delay filing charges against the employer, the reinstatement would still be granted, and back pay would still be awarded for the period after the filing of charges. Delay is not absolute bar. (*N.L.R.B.* v. *Walt Disney Productions* (9th Cir., 1944) 145 F. 2d 44, cert. den. 324 U.S. 877, 65 S. Ct. 1025, 89 L. Ed. 1429; *N.L.R.B.* v. *Mall Tool Co.* (7th Cir., 1941) 119 F. 2d. 709; *N.L.R.B.* v. *Crowe Coal Co.*, (8th Cir., 1939), 104 F. 2d 633, cert. den. 308 U.S. 584, 60 S. Ct. 107, 84 L. Ed. 489).

In *N.L.R.B.* v. *Crowe Coal Co., supra*, back pay was awarded for the period in which the Union was seeking the employer's voluntary compliance with the act as well as the time after the filing of the charges.

6. Both the Court of Claims in the Instant Case, and the Court of Appeals for the District of Columbia, in Similar Cases, Have Misapplied the Doctrine of Laches

In all Supreme Court cases passing on this situation, the question of delay was held not to involve lapse of time alone, but lack of initial action to assert the discharged officer's right to compensation which would amount to acquiescence by the complainant and would deprive the defendant of notice. On this basis, both *Norris* v. *United States, supra, and Nicholas* v. *United States, supra*, distinguished the case of *United States* v. *Wickersham* (1905), 201 U.S. 390, 26 S. Ct. 469, 50 L. Ed. 798. Thus, in *Norris* v. *United States*, Mr. Justice Day stated: (257 U.S. at pp. 80-81)

> "The question here is: Did Norris use reasonable diligence . . . to assert his right to the compensation attached to his office? . . . He did, not, as did Wickersham (citation omitted), promptly demand a restoration to his office, nor make any claim to its emoluments because the power of removal had been exercised without giving him the opportunity for a hearing which the statute affords."

And, in *Nicholas* v. *United States*, Mr. Justice Day stated: (257 U.S. at 75)

> "We agree with the Court of Claims that a person illegally dismissed from office is not thereby exonerated from obligation to take steps for his own protection and may not, for an unreasonable length of time, acquiesce in the order of removal . . . The claimant relies on the Wickersham case

> (citation omitted). . . . In that case the record disclosed that Wickersham was suspended on November 1, 1897, and that on November 5, 1897, he protested against his suspension, and on December 28, 1897, demanded his salary. The case did not present, and there was no occasion to decide, the effect of delay and acquiescence upon the right to recover compensation."

And, in *Meyers* v. *United States*, *supra*, Mr. Justice Taft stated: (272 U.S. at p. 107)

> "The Court of Claims gave judgment against Myers . . . The Court held that he had lost his right of action because of his delay in suing—citing United States ex rel. Arant v. Lane (citation omitted); Nicholas v. United States, (citation omitted). These cases show that when a United States officer is dismissed, . . . he promptly take effective action to assert his rights. But, we do not find that Myers failed in this regard. He was constant in his efforts at reinstatement. . . ."

The facts of that case disclose that Myers was removed on February 2nd, 1920, and did not file suit until April 21, 1921. In the meantime, he sent petitions to the President and to the Senate, and protested to the department which removed him, but took no legal action.

In the case of *United States* v. *Wickersham*, *supra*, claimant was removed on November 1st, 1897, and did not file suit until April 4th, 1899. In the meantime, he protested, as did Myers, but took no legal action.

Putting these cases together, it seems clear that the Court of Claims has neglected two of the essential elements of laches—namely, acquiescence in the illegal removal, and lack of notice to defendant of plaintiff's claim. Laches does not depend on speed in filing suit, but in apparent agreement with the justice of the ac-

tion of removal. Lack of acquiescence can be demonstrated by a mere protest, as in *Wickersham*, or a protest and a petition, as in *Myers*.

Petitioner demonstrated his lack of acquiescence continuously from the date of his removal until April 27, 1959, a period of almost five years; and had done so, not only by protest, but by actual litigation. Surely the government could not reasonably think he has acquiesced in his removal; and surely, the government had notice of his claim.

The Court of Claims itself has recognized this; in the case of *Joseph A. Baxter* v. *The United States*, (1952), 122 Ct. Cl. 632, the claimant had litigated in two separate suits against the Secretary of the Army in District Court for the District of Columbia; the first suit was dismissed for failure to substitute parties; the second suit was dismissed for laches (*Baxter* v. *Pace*, (1951) 193 F. 2d 20). But the Court of Claims overruled the government's motion for summary judgment saying (122 Ct. Cl. at 634):

> "Throughout the period of delay, the defendant knew plaintiff was claiming that he had been wrongfully discharged, and hence, that it might have to give him his back pay, and so it would seem improbable that his delay in resorting to the proper tribunal operated to defendant's prejudice."

CONCLUSION

It seems clear that petitioner has been denied due process—first by a decision of the U. S. Court of Appeals of the District of Columbia, dismissing his suit upon a questionable technicality—and second by a grossly erroneous decision of the Court of Claims in a

distortion of the doctrine of laches. He has not had his day in court.

This Court should hear the cause and determine for all lower courts and litigants the true application of the doctrine of laches to claims of discharged employees of the United States.

Wherefore Petitioner prays that a writ of Certiorari may issue directed to the United States Court of Claims and upon remand, that the judgment of said Court of Claims be vacated, reversed and set aside, and that this case be remanded to said Court with instructions to proceed further in accordance with the opinion of this Court.

Respectfully submitted,

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APPENDIX

(a) Court of Claims Opinion

BOVARD v. UNITED STATES, February 6, 1963.

(b) Statute of Limitations

"Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues" — as amended Sept. 8, 1954, c. 1263, sec. 52, 63, 68 Stat. 1246, 28 USCA 2501.

IN THE UNITED STATES COURT OF CLAIMS

No. 241-60

(Decided February 6, 1963)

BURTON C. BOVARD

v.

THE UNITED STATES

Andrew A. Macdonald for plaintiff. *James R. Murphy*, and *Cross, Murphy & Smith* on the briefs.

Edna P. Goldberg, with whom was *Acting Assistant Attorney General Joseph D. Guilfoyle*, for defendant.

ON PLAINTIFF'S AND DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT

LARAMORE, Judge, delivered the opinion of the court:

Plaintiff, a veteran's preference eligible, was removed for cause from his position as General Counsel of the Federal Housing Administration on July 15, 1954. Plaintiff's removal was upheld by the Appeals Examining Office of the Civil Service Commission, reversed by the Board of Appeals and Review, and an order entered restoring plaintiff to duty. The case was reopened on November 16, 1955, by the Civil Service Commission, which affirmed the action of the Federal Housing Administration. Plaintiff sued in

the District Court for the District of Columbia for reinstatement to his position, and upon cross-motions for summary judgment, the District Court granted the Government's motion. Plaintiff then appealed to the Court of Appeals for the District of Columbia circuit, and said court ruled on April 27, 1959, that plaintiff's failure to substitute proper successor parties was a fatal defect and remanded the case to the District Court to dismiss plaintiff's complaint. Plaintiff then, on June 24, 1960, brought this suit in the Court of Claims for back pay from July 14, 1954, to date of judgment.

The questions before us on cross-motions for summary judgment involve the question of collateral estoppel; the question of the right of the Civil Service Commission to reopen and reconsider the decision of their Board of Appeals and Reveiw; the question of attachment by the employing agency to its application for reopening two documents which had not been "admitted into evidence" at the prior administrative proceedings; the question of whether the Civil Service Commission violated any of plaintiff's rights under the Veteran's Preference Act; and whether plaintiff's claim is barred by laches.

After a full consideration of all the issues before us, we think that the decision in this case must be determined on the issue of laches.

A discharged employee is bound to assert his rights with diligence. The Supreme Court and this court have consistently applied the bar of laches in circumstances such as are present in this case. *Arant* v. *Lane*, 249 U.S. 367; *Nicholas* v. *United States*, 257 U.S. 71; *Henry* v. *United States*, 139 Ct. Cl. 362; *Miner* v. *United States*, 143 Ct. Cl. 801; *Bailey* v. *United States*, 144 Ct. Cl. 720. For example, in the *Arant* v. *Lane* case, *supra*, the employee was removed from office not later than July 20, 1913, and filed his petition 20 months later. The Supreme Court, in uphold-

ing the lower court's dismissal on the ground of laches, used this language.

> When a public official is unlawfully removed from office, whether from disregard of the law by his superior or from mistake as to the facts of his case obvious considerations of public policy make it of first importance that he should promptly take the action requisite to effectively assert his rights, to the end that if his contention be justified the Government service may be disturbed as little as possible and that two salaries shall not be paid for a single service.
>
> Under circumstances which rendered his return to the service impossible, except under the order of a court, the relator did nothing to effectively assert his claim for reinstatement to office for almost two years. Such a long delay must necessarily result in changes in the branch of the service to which he was attached and in such an accumulation of unearned salary that, when unexplained, the manifest inequity which would result from reinstating him renders the application of the doctrine of laches to his case peculiarly appropriate in the interest of justice and sound public policy. [p. 372]

Later, in the *Nicholas* case, *supra*, the Supreme Court, in affirming the Court of Claims on the question of laches, used this language:

> * * * While one inducted into office or public employment is entitled to the privileges or emoluments thereof, until legally separated therefrom, he is not absolved from the duty of diligence upon his part in the assertion of his right to the office, or to the compensation attached thereto. Public policy requires that the Government shall be seasonably advised of the attitude of its officers and employees attempted to be displaced when they assert illegal removal or suspension as a basis for the recovery of the office or its emoluments. [p. 76]

The above two Supreme Court decisions were followed by many Court of Claims' cases wherein the facts are very

similar to the facts in this case. For example, in the *Henry* case, *supra*, suit was filed one year and ten months after an administrative decision. In the *Miner* case *supra*, plaintiff delayed three and a half years. In the *Bailey* case, *supra*, the delay in filing suit was four years and five months.

In the case at bar, plaintiff was removed from his position on July 15, 1954, and his administrative remedies were exhausted by December 29, 1955, when the Civil Service Commission reversed the decision of the Board of Appeals and Review. Immediately thereafter plaintiff could have brought suit in this court. Instead, he chose to file suit in the District Court for reinstatement and did not file this suit until June 24, 1960. Even assuming that plaintiff was not required to bring his action for back pay in this court during the pendency of his suit in the District Court, still there was inexcusable delay in bringing the present action. Plaintiff was unable to obtain a decision in his first suit because of his own failure to substitute proper parties. Then, for no apparent reason, plaintiff delayed 14 months after the dismissal by the Court of Appeals before bringing this action. In light of the considerable time that had already elapsed before the dismissal, it was incumbent upon the plaintiff to bring this action without further delay, and certainly before more than still another year had passed.

Plaintiff does not attempt to excuse his tardiness in filing this suit. Rather he takes the position that laches is an equitable doctrine and should be invoked only in cases where a plaintiff has slept on his rights and not litigated at all. This contention is apparently made because of his District Court action. We concede that laches is an equitable doctrine, but call attention to the fact that this court and the Supreme Court have many times applied the doctrine of laches in instances wherein plaintiffs have sought back pay because of an alleged erroneous dismissal. This rule is manifest in all the cases cited earlier in this opinion.

Therefore, in this case, we think plaintiff waited too long. The Government undoubtedly paid someone else the money which plaintiff now claims and someone else did the work. Under these circumstances the delay of plaintiff as above outlined constitutes laches and plaintiff is thereby barred from recovery in this action.

Plaintiff's motion for summary judgment is denied, and defendant's cross-motion is granted. The petition is, accordingly, dismissed.

REED, *Justice (Ret.)*, sitting by designation; DAVIS, *Judge*; DURFEE, *Judge*; and JONES, *Chief Judge*, concur.

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In the Supreme Court of the United States

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 1079

BURTON C. BOVARD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Claims (Pet. App. pp. 1a–5a) is not yet reported.

JURISDICTION

The order of the Court of Claims dismissing the petition was entered on February 6, 1963. The petition for a writ of certiorari was filed on May 7, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether, on the facts of this case, the court below correctly held that petitioner was guilty of laches in the prosecution of his back-pay suit following his removal from the position of General Counsel of the Federal Housing Administration.

STATEMENT

Petitioner, a veterans preference eligible, served as General Counsel for the Federal Housing Administration (a grade GS–15 position) from 1940 to 1954.[1] On April 14th and May 7th, 1954, respectively, Norman P. Mason, Administrator of the FHA, placed petitioner on involuntary annual leave and served him with a notice of proposed adverse action pursuant to Section 14 of the Veterans' Preference Act of 1944, 5 U.S.C. 863. The notice enumerated nine charges of dereliction by petitioner in the performance of his duties as General Counsel. On July 15, 1954, petitioner was removed.

Petitioner appealed to the Civil Service Commission and, after a hearing, the Appeals Examining Office upheld the dismissal. Upon his appeal to the Commission's Board of Appeals and Review, the Board ruled that certain of the charges were defective for lack of specificity and that the balance of the charges were not supported by the evidence; accordingly, it recommended that petitioner be restored to his former position as General Counsel. Thereafter, the employing agency requested that the Commissioners reopen and reconsider the decision of its Board of Appeals and Review. The FHA appended to its review application copies of a report of the

[1] In compiling our statement we have reviewed in addition to the record filed in this Court, the Joint Appendix filed in *Borard* v. *Young*, 265 F. 2d 823 (C.A.D.C.), petitioner's initial suit for reinstatement which terminated with a dismissal of his complaint for failure to substitute successor government officials as parties

Senate Committee on Banking and Currency investigating FHA operations and an FHA investigation report.

By letters dated November 16, 1955, the Civil Service Commissioners notified both the employing agency and petitioner that the decision of the Board of Appeals and Review would be reopened and that each might submit "final representations." Petitioner submitted a detailed reply to the reports previously filed by the FHA. On December 29, 1955, the Civil Service Commissioners, after considering the entire record that was before the Board of Appeals and Review as well as the additional papers filed by both parties, reversed the Board's decision and upheld the propriety of petitioner's dismissal.

On February 14, 1956, petitioner instituted suit in the district court seeking reinstatement. Along with Norman P. Mason he named Civil Service Commissioners Philip Young, George M. Moore, and Frederick J. Lawton as party defendants. Defendant Young was succeeded by Commissioner Harris Ellsworth on April 18, 1957. Defendant Moore was succeeded by Commissioner Christopher H. Phillips on April 18, 1957, who was succeeded by Commissioner Bernard L. Flanagan on January 2, 1958, who was in turn succeeded on September 12, 1958, by Commissioner Barbara Bates Gunderson. Petitioner made no effort to substitute the successors to former

Commissioners Young and Moore within six months after their taking office.[2]

Ultimately the parties filed cross-motions for summary judgment, and, on July 15, 1958, the district court granted the defendant's motion. On March 19, 1959, pursuant to petitioner's appeal, the Court of Appeals for the District of Columbia Circuit remanded the cause to the district court with instructions to dismiss the complaint for failure to substitute successor parties.

On June 24, 1960, approximately fourteen months after the court of appeals rendered its decision, petitioner filed his petition in the court below seeking back pay from the date of his removal, July 15, 1954, to date of judgment. That court, on February 6, 1963, concluded that there was an inexcusable delay in bringing the present action and that petitioner's claim was barred by laches.

---

[2] Fed. R. Civ. P. 25(d), 28 U.S.C., provided in pertinent part at that time as follows:

"When an officer of the United States, or of the District of Columbia, the Canal Zone, a territory, an insular possession, a state, county, city, or other governmental agency, is a party to an action and during its pendency dies, resigns, or otherwise ceases to hold office, the action may be continued and maintained by or against his successor, if within 6 months after the successor takes office it is satisfactorily shown to the court that there is a substantial need for so continuing and maintaining it. * * *"

And Fed. R. Civ. P. 6(b) provided that the court may not extend the time for taking action under Rule 25. Rule 25 has since been amended. See Fed. R. Civ. P. 25(d), 28 U.S.C. (1958 ed. Supp. III App.).

ARGUMENT.

1. Petitioner's contention that the doctrine of laches is confined to suits in equity and mandamus, and hence inapplicable to actions for back pay, is entirely unfounded. The Court of Claims, as petitioner concedes, has consistently invoked that doctrine as a bar to back-pay actions brought without due diligence by discharged federal personnel.[*] And this Court has thrice upheld the dismissal of suits for compensation or reinstatement by government employees on grounds of unreasonable delay. *United States ex rel. Arant* v. *Lane*, 249 U.S. 367; *Nicholas* v. *United States*, 257 U.S. 71; *Norris* v. *United States*, 257 U.S. 77. Petitioner argues that *Arant*, though admittedly based on laches, was an action in mandamus, while *Nicholas* and *Norris*, both suits for compensation, rested not upon laches but upon the concept of "abandonment". However, the latter distinction is purely semantic. In *Nicholas*, the Court made it clear (257 U.S. at 76) that it was applying the same principle it had applied in *Arant*, *i.e.*, that:

> * * * Public policy requires that the Government shall be seasonably advised of the attitude of its officers and employees attempted to be displaced when they assert illegal removal or suspension as a basis for the recovery of the office or its emoluments. This is necessary in order that proper action may be taken in the public interest, as well as that which is required

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[*] See, *e.g.*, *Bailey* v. *United States*, 171 F. Supp. 951, 144 Ct. Cl. 729; *Miner* v. *United States*, 113 Ct. Cl. 801; *Henry* v. *United States*, 139 Ct. Cl. 362; *Kaufman* v. *United States*, 93 F. Supp. 1019, 118 Ct. Cl. 91.

> to vindicate the rights of one wrongfully removed from the public service. * * *

Whether the label be "laches" or "abandonment", this Court's holdings establish that federal employees must proceed with reasonable diligence in asserting their claims. A contrary holding, here as in *Arant*, might entail the payment of "two salaries * * * for a single service" and the "accumulation of unearned salary" for an extended period (249 U.S. at 372).

2. The only remaining question is whether the laches doctrine was properly applied in this case. Petitioner's removal was effected on July 15, 1954, and his administratives remedies were exhausted by December 29, 1955. At that time he could have instituted a back-pay suit in the court below. Instead he chose to bring suit in the district court, on February 14, 1956, seeking reinstatement. Petitioner's failure to substitute newly appointed members of the Civil Service Commission ultimately resulted in dismissal of that action by the court of appeals on April 27, 1959, forty months after the termination of his administrative proceedings.[*] Having served for fourteen years as the chief legal officer of a major governmental agency, petitioner should well have understood the substitution requirement. And, considering the time consumed in the fruitless earlier action, due diligence most certainly required that he proceed thereafter without further delay. Yet the instant

[*] In *Benson* v. *Zahner*, 289 F. 2d 756 (C.A. D.C.), certiorari denied, 366 U.S. 904, as here, the claimant's second suit was deemed barred by laches after his first action resulted in a dismissal because of his failure to obtain a substitution of parties.

action—where for the first time petitioner asserts a claim for back pay—was not filed in the court below until June 24, 1960, fourteen months after the adverse determination by the court of appeals and four and one-half years after the final decision of the Commission. In view of the time lapse attributable to petitioner's failure to prosecute diligently his original suit, the Court of Claims was plainly justified in concluding that the additional delay in commencing this action was "inexcusable" and, accordingly, that the case was an appropriate one for the application of laches.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JUNE 1963.

U.S. GOVERNMENT PRINTING OFFICE: 1963